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IN THE

Supreme Court of the United States

October Term, 1966
No. 3

ROBERT REDRUP,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Writ of Certiorari to the Appellate Term of the Supreme Court of New York, First Judicial Department.

Brief Amicus Curiae of Citizens for Decent Literature Inc., an Ohio Corporation, in Support of Respondent.

Interest of Amicus Curiae.

Citizens for Decent Literature, Inc., an Ohio Corporation, with local affiliates throughout the United States is a non-profit, non-sectarian and non-political corporation with national headquarters in Cincinnati, Ohio, formed for and dedicated to the cause of good, decent and wholesome literature with a view to oppose and eliminate obscene literature, by cooperating with law enforcement in the enforcement of the laws. For the Court's convenience *amicus curiae* is hereinafter referred to by the single short title, CDL.

CDL believes that there exists a growing flood of publications, purposely designed and manufactured with a sensationalized appeal to prurient interest, that threat-

ens to overthrow the basic morality upon which our nation and our Constitution were founded; that while the First Amendment of our Constitution has, from the time of our nation's founding, been construed to afford no protection to such publications, a loud voice is now being heard in the courtroom advocating the overruling of this "balancing of interest" interpretation in favor of an absolutist approach, aimed at nullifying the nation's basic obscenity laws.

At its national convention in Chicago during October of 1963, the national organization of Citizens for Decent Literature adopted a policy aimed at giving increased support in the fight against "obscenity," through legal advocacy in the courtroom in support of the people's case.

Robert Redrup v. The People of the State of New York, is a case of nationwide importance which will have a serious effect on enforcement of the obscenity statutes throughout the nation.

Statement of the Case.

On April 10, 1964, at about 5:50 p.m. patrolman Robert Greifenstein approached the newsstand at 263 West 42nd Street, which is on the street level of the subway arcade and saw displayed in a bookrack the books: "Lust Pool" and "Shame Agent". The officer pointed to the bookrack and told the clerk, petitioner Robert Redrup herein, "Lust Pool and Shame Agent". [R. 10.] Petitioner Redrup removed the two books from the bookrack and placed them on the counter saying, "That will be $1.80." Patrolman Greifenstein told him, "I am sorry; I thought they were 50¢ each." Petitioner replied, "These cost more; they are 90¢ each." The officer gave petitioner $2.00 and received 35¢ in change. Petitioner

Redrup placed the two books in a brown paper bag and handed the bag to the patrolman. [R. 11.]

The front cover of "Lust Pool" [People's Ex. 2] shows a nude female sitting at the edge of a swimming pool, facing the viewer. Her legs are crossed in front of her, yogi-fashion, and her arms are extended in front, so as to cover her vaginal area. In the pool in the background, a male is looking in her direction. The front cover reads "They spent a summer of sin beside this — Lust Pool by J. P. X. Williams, a Pillar Book 75¢." The rear cover reads "Too Many Women!! Too many loves. Everywhere Marshall Jones turns he finds another shameless minx, arms held wide, welcoming him to share her most depraved hunger. They find him from humble bars to palatial mansions . . . from gaudy sin dens, called strip joints to the most degrading workshops of professional hustlers. And Big Tom, the Vice Lord, owns them all, lock, stock and loving. . . . Only Marshall Jones proved to be too much to keep in the lust pool. . . ." The binding edge reads "Lust Pool 75¢ PB841."

The front cover of Shame Agent [People's Ex. 1] shows the rear view of a nude female standing with her back toward the viewer. A portion of a towel covers the rear portion of her body from her buttocks to her shoulders. The illusion is that the front of her body is uncovered. In the background, a male figure appears to be looking in the direction of the viewer (and the front view of the nude female). The front cover reads, "He sold public relations — by the sin load. — Shame Agent. by Don Bellmore, an Ember Book 75¢." The binding edge reads "Shame Agent price 75¢ EB943." The rear cover reads, "Press Agent Passion. Paul Clarke was the ablest representative the firm of Oscar Clem-

ent's public relations had. Almost every woman in town would testify to that . . . especially Clarke's vixen of a secretary, Kathy. And every one who knew Paul was demanding his attentions in exchange for any little favor he might do to get their names before the public . . . being very careful, of course, to screen out all the shame and degradation of their truer activities. . . ."

The police officer identified himself and showed the defendant a search warrant which he executed, seizing six additional copies of Lust Pool. [R. 11, 3.]

Petitioner told the officer he had worked for Milton Block for approximately two years, and alternated between the newsstand where the arrest was made and the bookstore down the stairs in the subway arcade. Patrolman Greifenstein asked the petitioner, "Why do you sell this garbage?" The petitioner stated, "There is worse stuff than that around; I think these books here are worse" referring to girlie magazines that were on top of the counter with the nude and semi-nude in color and black and white. [R. 12.]

On April 11, 1964, patrolman Greifenstein filed a complaint alleging a violation of New York Penal Law, Section 1141 in two counts naming the publications "Lust Pool" and "Shame Agent". [R. 2, 3.] On April 29, 1964, a two-count information [R. 6] was filed in the Criminal Court of the City of New York, County of New York, charging petitioner with violations of New York Penal Law, Section 1141, Subdivision (1). Each count of the information alleged that petitioner had sold an obscene book in violation of the statute. [R. 6.] The cause came on for trial before a three-judge court in the Criminal Court of the City of New York, County of New York on June 4, 1964. [R. 9.] (Impellitteri, Castaldi and Rohan.)

People of the State of New York; Case in Chief.

Robert Greifenstein testified that he was a patrolman for the City of New York and that on April 10, 1964, at about 5:50 p.m. he visited the newsstand at 263 West 42nd Street[1] on the street level of the subway arcade of the City. As he approached the newsstand he saw displayed in a bookrack, two books "Lust Pool" and "Shame Agent". He stated that he pointed to the bookrack and said to the petitioner, the clerk at the newsstand, "Lust Pool and Shame Agent". [R. 10.] The petitioner removed the two books from the bookrack and placed them on the counter whereupon the patrolman handed the petitioner a dollar bill. Petitioner stated to the patrolman, "That will be $1.80.", whereupon the patrolman said, "I am sorry, I thought they were 50¢ each." Petitioner stated to the patrolman, "These cost more; they're 90¢ each." The patrolman pointed to the copy of "Shame Agent" and stated that "Shame Agent" was marked 75¢, whereupon the petitioner said, "O.K.

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[1]In *People v. Weingarten*, 50 Misc. 2d 635, 271 N.Y.S. 2d 158 (June 13, 1966) Trial Judge Amos S. Basel found the defendant guilty of selling an obscene paperback book "Flesh Worshippers" at *251 West 42nd Street*. The judge noted at page 640 that "Finkelstein who was convicted owned a bookshop at *251 West 42nd St.*" Two of the shops involved in *Mishkin v. N.Y.*, 383 U.S. 502 (Mar. 21, 1966) were located at *254 West 42nd Street* (Publisher's Outlet) and *228 W. 42nd Street* (Midget Book Shop). It would appear that a trial judge should be able to take judicial notice of those activities which have acquired a local, even national reputation. See N.Y. Journal-American, Oct. 29, 1963 "The lights were bright early today on *42nd Street between Broadway and 6th Ave.*—one of the seediest strips of real estate in town. The assignment was to see what kind of smut material could be found in the area. The material was there—and so were the stores. They're not hard to find. There were six on 42nd street strip—two more in the subway—and many were still open at 2:30 A.M. Most of the places looked the same. They were sooty and there was provocative calendar art on the walls—nudes and semi-nudes—with salacious type book jackets and titles lining the stalls. . . ."

give me $1.65." The patrolman handed him a second dollar bill and received 35¢ in change. Petitioner placed the two books in a brown paper bag and handed the bag to the patrolman. The patrolman showed the petitioner a search warrant and executed the same, seizing 6 copies of "Lust Pool." [R. 3, 10-11.] "Shame Agent", "Lust Pool" and the paper bag were received in evidence as Exhibits 1-3.[2]

The patrolman testified that he had the following conversation with the petitioner: "I asked petitioner who he worked for; he said that he worked for Milton Block. I asked him how long he worked for Mr. Block; he said for approximately 2 years; he alternated[3] between the newsstand where the arrest was made and the bookstore which was down the stairs in the subway itself. He stated that he made $75 a week. I asked the defendant while we were in the newsstand 'Why do you sell this garbage'. The defendant stated, 'There is worse stuff than that around;'[4] he says, 'I think these books here are worse,' and he was referring to girlie magazines that were on top of the counter with the nudes and semi-nudes in color and black and white." [R. 12.]

On cross-examination by Mr. Fraenkel, the defense attorney, patrolman Greifenstein stated that he did not make a note of the conversation after the arrest, nor did

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[2]See Appendix A. The covers and frontispiece are "autoptical evidence" of pandering, *i.e.*, "purveying textual or graphic matter openly advertised to appeal to the erotic interest of customers. . . :" *Womack v. United States*, 294 F.2d 204, 205; *Ginzburg v. United States*, 16 L. Ed. 2d 31, 36.

[3]Petitioner's conversation with the Police Officer conflicted with the testimony given by him in his defense. "Tom" and "John," the "Alibi" witnesses were not produced.

[4]By his own statement petitioner had "objective" knowledge of the *character* of the subject matter, a fact also established by the sales transaction itself.

he have such information in the complaint that he filed. Asked, "You're assigned to this field of so-called obscene books, are you not" the officer stated "I am not assigned to it specifically, only when I receive a complaint." Asked how many arrests he had made since April 10,[5] the patrolman said, "I haven't made many for 1141 since April 10th" and that he had made approximately 20 for other type arrests. Asked whether he made notes of conversations with the persons arrested on those 20 occasions he said, "yes", but that he had not made notes in this instance. [R. 12-13.]

The People of the State of New York rested their case.

The defense attorney moved to dismiss each count of the information on the following grounds: (1) the People had failed to prove scienter; (2) the People had failed to prove community standards, and (3) neither book was obscene. The court reserved decision on the motion. [R. 13.]

Robert Redrup: The Defense.

The defendant Robert Redrup testified that he had been employed at the place of business involved for two years, and that his principal duty was working downstairs in the bookstore. He stated that the bookstore was "down in the arcade of the IND Subway, Eighth Avenue" and was about 20 feet by 12 feet. [R. 14.] He stated that the bookstore sold "fiction, non-fiction, historical, philosophical . . .". Judge Impellitteri remarked, "Will you keep up your voice? We have to hear you."[6]

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[5]The interval between arrest and trial was only eight weeks, a duration not likely to cause Patrolman Greifenstein's memory to become dull.

[6]On three occasions during the short trial, petitioner was asked to keep his voice up [R. 15, 16, 17.] It was up to the

The petitioner continued, "historical, philosophical, mythology, popular novels, mysteries, western." He stated that there was a newsstand connected with that bookstore under the same ownership, located up on the street level at 263 West 42nd Street.

Asked by the defense counsel, "How much of your time is spent at that newsstand" he replied, "One hour, 5:30 to 6:30", and ". . . it was just in that period because a man was sick, I had to go up there from 5:30 to 6:30 when the other man came in, and it was just on Fridays, and it only had been for that week and not for the week before, but two weeks before that." He stated that he had been there for about an hour on one earlier occasion. [R. 15.]

Asked by the defense counsel what his conversation with Patrolman Greifenstein was, he stated that the police officer asked him for the books and that he asked the other man, "John", if he had them in the place [R. 15], and that "John" looked and got them down and handed them to the petitioner. [R. 15.] He said that the police officer asked him how much.

Petitioner was asked to "speak up, please" whereupon the petitioner said, "I told him '$1.80,[7] and then there was a question of a price because one was marked .75 on the binding, and I asked John about it and he said 'Charge what it says' I told him, all right a dollar sixty-five' ($1.65). He paid me, and I gave him the change." [R. 16.]

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three trial judges to evaluate the defendant's manner of testifying—a factor which cannot be reproduced in a trial transcript for review by an appellate court.

[7]The inflated price is a "trade mark" in the industry, both books were marked to retail at $.75.

The petitioner was asked to answer the following questions regarding his conversation with officer Greifenstein, [R. 16]:

"Q. Did he ask you anything about how long you have been employed there? A. After, yes.

Q. Tell us about that conversation. A. I told him I was only up here for an hour on Friday night, and it was only for this particular period because a man was sick, that he couldn't be there, so I filled in for that hour.

Q. You heard the officer testify that you had said there were worse books than these here; was anything like that said? A. I don't recollect anything like that going between us in conversation.[8]

Q. Was anything said by you with reference to certain girlie magazines that were on the counter. A. No."

Petitioner stated that he had never seen either of the two books before that time. [R. 16.]

On cross-examination petitioner was asked the following, regarding his previous employment at the newsstand [R. 17]:

"Q. And on how many occasions had you worked at the newsstand where you were arrested? A. Previously?

Q. Previously to the time you were arrested. A. For the remaining period of the two years—16 months."

Judge Impellitteri remarked, "Will you keep up your voice?" The petitioner continued:

"Sixteen months; the remainder of the two years I worked upstairs at the newsstand."

[8]Petitioner's memory was dim only where it counted.

Petitioner was asked,

"Your salary was $75 a week? A. Yes it is.

Q. Did you tell the officer it was $75 a week? A. Yes I did."

The petitioner was asked the following questions regarding the "sick man" referred to on direct examination [R. 17]:

"Q. You say another man was sick and that's why you were helping out in the newsstand? A. That is correct.

Q. What is his name? A. Tom Leonard.

Q. And how long had he been sick? A. He was working, but he couldn't work at the newsstand; in other words, he had a rupture and he couldn't work up there in this period because he couldn't lift heavy newspaper bundles.

Q. Between 5:30 and 6? A. No, he was working downstairs.

Q. He couldn't work at the newsstand between 5:30 and 6:30? A. Right.

Q. So he went down to the bookstore? A. He couldn't work at the newsstand at all, so because of our schedule the way it was, the man who was going to take his place at the newsstand came in at 6:30, so what we did was he came in 5:30, relieved me at the bookstore that Friday night. I went up from 5:30 to 6:30 until the other man came. When the other man came, incidentally, while the police officers were there."

The petitioner was asked if Mr. Leonard was in court today and the petitioner replied, "No he isn't." [R. 18, 19.][9]

[9]Petitioner's "Alibi" witnesses were not brought into court to give their testimony.

The following questions were asked regarding "John":

"Q. You say. there was another gentleman named John who was in the newsstand with you. A. Yes, right.

Q. Was he working there also? A. Yes.

Q. Do two men usually handle that newsstand? A. At that time, yes.

Q. And was he also selling magazines and newspapers and what not? A. He was selling—he was over on the side where magazines were, and I was at the cash box selling whatever people bought, newspapers predominantly.

Q. You say when the Police Officer asked by name for the two books, you in turn questioned John? A. That's right.

Q. And did he show you where the two books were? A. He went and got them.

Q. He got them? A. That's right.

Q. And he handed them to you. A. I believe so, yes." [R. 18.]

"Q. Well, did he hand them to the Police Officer directly, or did he hand them to you? A. I am not positive on that point whether he handed them to me or to the Police Officer.

Q. Is it possible he put them on the stand himself, on the counter? A. It is possible, yes.

Q. And then he went back to his original post on the other side of the stand? A. Well, it is one stand, yes right there." and [R. 20]

"Q. Was John present when the arrest was made? A. Yes he was.

Q. Did the Police Officer arrest him? A. No he did not.

Q. Did he say anything to John? A. He said he is going to take one of us in.

Q. John said that? A. No, no.

Q. The police officer said that? A. Yes."

And [R. 21]:

"Q. Tell me, is John here today?[10] A. No, he isn't.

Q. Have you spoken to your employer Mr. Block about this case? A. He knows about it, yes.

Q. Have you spoken about it—did you tell him you were arrested? A. Sure, definitely."

The petitioner was asked the following questions concerning his conversation with patrolman Greifenstein as to the price of the paperbacks:

"Q. And you said '$1.80' right? A. Yes.

"Q. How did you arrive at the figure $1.80? A. Because they charge 90¢ apiece for those books.

Q. Didn't you look at the covers? A. Not usually, no.

Q. Did you look at the covers in this case? A. No, not until after there was some question.

Q. You just said a dollar eighty? A. Yes.

Q. Off the top of your hat? A. Yes, because there is a sign, 90¢ apiece.

Q. Look at People's Exhibit 2, 'Lust Pool', tell me if there is a figure on that? A. No, no figure.

Q. No figure at all? A. No, not there.

Q. And look at 'Shame Agent' and tell me what figure is on that? A. 75¢.

Q. 75¢? and you charged $1.80? A. No.

Q. You asked a dollar eighty originally. A. Originally, yes, I asked a dollar eighty.

Q. Then you turned to John, is that right? A. Right, and I asked him 'what about this' it wasn't crossed off, and he said, 'Charge what it says' and I told the officer then, 'a dollar sixty-five.' "

The petitioner was asked the following questions concerning the contents in the material offered for sale [R. 20-21]:

"Q. What type literature is sold in the newsstand where you worked that particular day where you were arrested? A. Magazines, papers, pocketbooks.

Q. Were any girlie magazines on the counter? A. Girlie magazines, yes.

Q. There were? A. Yes.

Q. Tell me, do you sell philosophical works in that newsstand? A. They don't handle that type pocketbook.

Q. Do you handle historical novels? A. No.

Q. Primarily detective stories, isn't that right, westerns and books of this type, isn't that what you sell in that newsstand? A. They sell Time magazine, Life, the usual magazines that newsstands sell, sport magazines, racing magazines.

Q. But you also know that books along the style of 'Lust Pool' were sold in that stand, didn't you, when you took over? A. I knew those books were sold there; I could see them.

Q. Generally, you knew what was sold in that newsstand, the type literature? A. No.

Q. Well, you knew philosophical works weren't sold in that newsstand? A. Of course.

Q. Did you sell any books by Rousseau at that newsstand? A. No.

Q. Do you sell any books by Descartes at that newsstand? A. Not familiar with the title.

Q. Do you sell any books by Winston Churchill in that newsstand? A. Not unless they're in magazine articles.

Q. I am talking about pocketbooks. A. No."

The defendant rested his case.

The People of the State of New York rested their case.

The defense attorney renewed his motion for a judgment of acquittal on the ground that the People had failed to prove the defendant's guilt beyond a reasonable doubt. The Court reserved decision and set the case down for decision on the 11th of June. [R. 22.]

On June 11, 1964, petitioner was convicted by the 3-judge court on both counts of violating New York Penal Law Section 1141. [R. 23.] On July 28, 1964, petitioner received a suspended sentence. [R. 24.] On December 17, 1964, the Appellate Term of the Supreme Court, First Department (Gold, Capozzoli, Hofstadter) affirmed the judgment without opinion. [R. 27.] Application for leave to appeal to the Court of Appeals of New York was denied without opinion on January 4, 1965, by Associate Justice Stanley H. Fuld. [R. 28.]

Summary.

Petitioner's argument that this Court's decision in *Smith v. California* imposes a specific intent requirement misreads *Smith* and disregards the subsequent expressions in *Mishkin v. New York.*

To insure cohesiveness, a frame of reference must be drawn—that of the defendant's state of mind. The state of mind spectrum which may exist "subjectively" in any person who has sold a book which is obscene as a matter of fact has five classes or degrees of "subjective" knowledge. Three are generally regarded as subjective knowledge and the last two, "objective" knowledge.

The scienter requirement came into the law in the *Smith* decision. The Court's language, properly interpreted, indicated that subjective knowledge was not a requirement. This court's language and reference to the California scienter requirement in *California v. Alberts,* seemed to indicate that "awareness of the contents and character" was the test, with an objective factor somewhere between ordinary negligence and recklessness.

The *Mishkin* case established "recklessness" as an acceptable scienter requirement, drawing a comparison between the Model Penal Code scienter version and the New York statute. That case clearly established the principle that there is no constitutional requirement which establishes "subjective" knowledge as the People's burden of proof.

The front and rear covers of Exhibits 1 and 2 are autoptical evidence of obscenity. Petitioner, being aware of their character should have known there was a high probability that they were hard core pornography, as their contents subsequently reveal them to be. Petitioner knew their sales price was inflated. He was not

new to the trade, having worked for two years as a retail book seller clerk on 42nd Street in the midst of the "dirty book" trade. The reputation of this class of book should have been recognized. Contrary to petitioner's assertion in his jurisdictional statement, similar books have unanimously been held to be obscene by the appellate courts which have considered them. The similarity in the format of such books and their patent offensiveness can be seen at a glance.

In the seven years since the *Smith* case, appellate courts have found no difficulty in affirming convictions based on objective knowledge and substantially similar circumstantial evidence.

In reviewing this state court judgment, certain standards and criteria should be applied.

The determination of obscenity is primarily a question of fact, the definition itself being phrased as a jury question. The *Roth* court did nothing more than update prior rules on obscenity.

While obscenity is primarily a question of fact, the court also has its proper role, *i.e.*, to ascertain that the fact finder does not overstep the boundary between a court and a jury question.

In weighing the balance, amicus underscores the relative right of the government to regulate matters relating to sexual morality. The public interest in good public morality relating to the sex function is paramount.

The United States Supreme Court must, in cases where the line is drawn, examine for itself the statements in issue and the circumstances under which they were made to see whether constitutional rights are abridged. We believe the Court's function simply to be that of ascertaining whether a jury question has been presented.

The Court must ask itself pragmatically, "Is this a case of 'speaking'—or of 'pandering' "? Where hard core pornography is concerned, there is no issue of "free speech" and the "sufficient evidence" standard should suffice in determining whether the *mens rea* requirement has been met.

Under our analysis the evidence "amply" supports the trial court's findings that the "scienter" requirement had been met.

ARGUMENT.

I.

THE JUDGMENT OF CONVICTION HEREIN DOES NOT VIOLATE ANY OF PETITIONER'S CONSTITUTIONAL RIGHTS.

A. Proof of Specific Intent and "Subjective" Knowledge Is Not Constitutionally Compelled by Smith v. California, nor Is It Required by New York Penal Law 1141. Mishkin v. N. Y. Instructs That "Objective" Knowledge of the Contents and Character of the Materials, Being Synonymous With Reckless Conduct, Meets the Smith Requirements.

Petitioner argues in his brief that this Court's decision in *Smith v. California,* 361 U.S. 147, 80 S. Ct. 215, 4 L. Ed. 2d 205 (Dec. 14, 1959) imposes a constitutional requirement ". . . that the State bear the burden of persuasion to show that an accused *knew* that the material involved was obscene *and,* with such guilty knowledge, disseminated the material *with the intent of appealing to prurient interest.*" (Our emphasis.) (Pet. Br. pp. 7, 14.) Such an interpretation misreads the *Smith* case and totally disregards the subsequent expressions of this Court in *Mishkin v. New York,* 383 U.S. 502, 16 L. Ed. 2d 56, 86 S. Ct. 958 (March 21, 1966). This Court has already established that "subjective" knowledge is not the prosecutor's burden of proof under the constitutional limitation.

It is important at the outset of these arguments that a frame of reference be drawn to insure cohesiveness. The proper frame of reference is the one under investigation—the defendant's state of mind.

1. An Analysis of the Defendant's State of Mind in Relation to the Mental Element of "Knowledge".

The prosecution's concern is the state of mind that must be proved as to any defendant, as expressed in the scienter provision of the Penal Statute.

Consider the state of mind spectrum which may exist "subjectively" in any person who has sold a book which is obscene as a matter of fact. Degrees of "subjective" knowledge are listed in chronological order.

(1) He may have been aware of the fact that the material was obscene from personal evaluation (knowledge of fact);

(2) He may have believed the fact the material was obscene, but his awareness was not from personal evaluation (knowledge of fact);

(3) He may have been aware that he had not the slightest notion whether the book was obscene or not (avoidance of knowedge);

(4) He may have believed the book not obscene, but have had no reasonable grounds for his belief (knowledge contrary to fact—criminal negligence);

(5) He may have believed the book not obscene, but have had reasonable grounds for his belief (knowledge contrary to fact—or only slight negligence).

Addressing himself to the above range in attitudes, Professor Rollin M. Perkins notes that the two extremes (1) and (5) require little comment. (Perkins, A Rationale of Mens Rea., 52 Harv. L. Rev. 905 (1939); Perkins on Criminal Law, p. 684.) Only in the

most theoretical discussions would it be questioned that one has knowledge of facts of which he has been made aware by his own observations. Similarly it would not be suggested that one has knowledge of facts when he has a bona fide belief otherwise, based upon reasonable grounds, unless (1) the particular offense does not require *mens rea* for conviction, *i.e.,* traffic offense, or (2) the deeds even under the circumstances as they were reasonably supposed to be, would have involved such a degree of social fault that the doer may properly be held to have acted at his peril in this regard. Statutory rape is such an offense. The state of mind in category (5) has generally been interpreted by the courts to be no defense. One who has unlawful intercourse with a girl under the age of consent is guilty of statutory rape although he *reasonably* believed she was over that age.

Class (2) is regarded as "knowledge" as that word is used in regard to *mens rea.* The distinction between class 2 and class 3 is the difference between an actual "belief" and a mere fugitive doubt based upon no grounds at all.

Class (3), "guilty avoidance of knowledge" may take either of two forms: One with a deliberate anti-social purpose in mind may make a positive statement purporting to be based upon his own knowledge, being fully aware that he has no such knowledge, in order to forestall an inquiry into the facts by another, or to mislead an inquiry in a proceeding such as the trial of a case; or one with a similar purpose may deliberately "shut his eyes" to avoid knowing what would otherwise be obvious to view. In such cases, so far as the criminal law is concerned, the person acts at his peril in this regard,

and is treated as having "knowledge" of the facts as they are ultimately discovered to be.

Awareness of fault is the characteristic which distinguishes class (3) from class (4). In the latter—bona fide belief contrary to fact, not based upon reasonable grounds, there is no awareness of fault—the belief is entertained in good faith but was acquired as a result of gross negligence.

Classes (1), (2) and (3) are distinguishable from classes (4) and (5) in that in the latter, the subjective belief is actually contrary to the fact, one results from gross negligence and the other from slight negligence or no negligence.

Professor Perkins diagrams the meaning of "knowledge" as a *mens rea* requirement as follows:

"Knowledge"

(1) Guilty knowledge. Awareness of the fact as a result of personal observation.

(2) Guilty belief which is correct.

(3) Guilty avoidance of knowledge.

(a) Guilty statement as of knowledge by one who is aware that he does not know,—which statement turns out to be contrary to the fact.

(b) Guilty "shutting of the eyes" for fear of discovering the fact which an investigation would have disclosed.

What of "knowledge"

(4) Bona-fide belief contrary to fact resulting from criminal negligence.

(5) Bona-fide belief contrary to fact but based upon reasonable grounds (or resulting from only slight negligence).

2. The Scope of the "Mental Element" Established in Smith v. California.

The "scienter" requirement came into the law through Justice Brennan's opinion in *Smith v. California, supra.*

Eleazar Smith operated a retail book and magazine store in Los Angeles. Among his stock was a book entitled *Sweeter Than Life* by Mark Tryon, published by an obscure publisher, Vixen Press. A Los Angeles police officer bought some magazines and a copy of the book from a clerk in Smith's store and then arrested the clerk.

At the time of Smith's arrest, two obscenity laws were operative in the Los Angeles jurisdiction: The California State Obscenity Statute, and a Los Angeles City Ordinance on Obscenity. The State statute required "scienter", *Alberts v. California,* 354 U.S. 476, 479 (June 24, 1957); the city ordinance did not. Smith was charged only with a violation of the city ordinance.

The trial court found Smith guilty and sentenced him to 30 days in jail. The Appellate Department of the Superior Court affirmed the judgment.

On appeal to this Court, Justice Brennan in the majority opinion (joined by Warren, Clark, Stewart and Whittaker) reversed the judgment, ruling that a state cannot constitutionally eliminate all mental elements from the crime; because to do so seriously restricted the dissemination of books that are not obscene.

The prosecutor's concern was voiced during arguments in the *Smith* case. If the *Smith* judgment were

reversed, it would establish that a "mental element" was required, but it would also leave a void. What was the state of mind that had to be proved? How great or how slight was that burden of proof? How do the people, in fact, establish such proof? This Court in its opinion answered the people's fears that the prosecution of obscenity would be impossible if a "scienter" requirement were introduced, and in doing so established, what to *Amicus* seemed to be rather clear guidelines, at page 154:

> "It is argued that unless the scienter requirement is dispensed with, regulation of the distribution of obscene material will be ineffective, as booksellers will falsely disclaim *knowledge of their books' contents or falsely deny reason to suspect their obscenity*. We might observe that it has been some time now since the law viewed itself as impotent to explore the actual state of a man's mind. See Pound, The Role of the Will in Law.' 68 Harvard Law Review 1, cf. *American Communications Association v. Douds*, 339 U.S. 382, 411, 94 L. Ed. 925, 950, 70 S. Ct. 674. Eyewitness testimony of a bookseller's perusal of a book hardly need be a necessary element *in proving his awareness of its contents*. The circumstances may warrant the inference that he was aware of what a book contained, despite his denial." (Our emphasis.)

The language "proving his awareness of its contents" seemed to negate any argument that "subjective" knowledge was a requirement.

The *Smith* Court at page 152, footnote 9, also pointed to the scienter requirement of the California Obscenity Statute considered in *California v. Alberts (Roth-*

Alberts), 354 U.S. 495, 1 L. Ed. 2d 1498, 77 S. Ct. 1314 (1957) and sustained in that case:

> "The General California Obscenity Statute, Penal Code Section 311 requires scienter, see note 3, and *was of course sustained by us in Roth v. U.S.*" (Our emphasis.)

An examination of the scienter burden imposed by the California statute and approved by the *Roth-Alberts* court should have silenced all argument on whether the constitutional requirement included a specific intent and proof of "subjective" knowledge, *i.e.*, classes 1, 2 and 3, *supra*. The judicial construction given by the California courts to the California statute which was before this Court in the *Smith* case appears in *California v. Smith*, 161 Cal. App. 2d 860, 237 P. 2d 636 (June 23, 1958):

> "A defendant is not guilty of violating Penal Code Section 311 *unless he had knowledge of the character of the material. People v. Wepplo, supra*, 947, 78 Cal. App. 2d 959, 964, 178 P. 2d 853. *To the word 'knowledge' we would add 'or notice,' meaning thereby knowledge of facts which would have put a reasonable and prudent man on inquiry as to the contents of the materials.* To appear profound, we refer to this knowledge or notice as 'scienter.'" (Our emphasis.)

Under the principle that this Court must accept a state court's construction of a statute and proceed to test its validity on that basis, *General Trust Co. v. Blodgett*, 287 U.S. 509, 513; *Kingsley Pictures Corp. v. Regents*,

360 U.S. 684, 688, it would appear that this Court saw no constitutional problems with the test imposed therein. The prosecutor's burden under *California v. Alberts* was "knowledge of the character of the material or knowledge of facts which would have put a reasonable and prudent man on inquiry as to the contents of the materials." There is little doubt that "subjective" knowledge is *not* a requirement under this California test. "Objective" knowledge is sufficient — the measuring rod was the reasonable and prudent person, not the defendant. A reasonable classification of the prosecutor's burden in the *Alberts* case would certainly include class (4) *supra.*

It thus appeared that, after Smith, specific intent and "subjective" knowledge was definitely not a limiting requirement. This Court's approval of the language "in proving his awareness of its contents" and its apparent approval of the scienter provision as construed by the California courts in *California v. Alberts, supra,* which employed the "reasonable and prudent man" test were strong support for the proposition that the prosecutor did not have the burden of proving "subjective" knowledge on the part of the defendant as a constitutional limitation. This proposition was confirmed by this Court's decision in *Mishkin v. New York,* 383 U.S. 502, 16 L. Ed. 2d 56, 86 S. Ct. 958, approving the burden of proof established in the New York statute, as interpreted by the New York Court of Appeals.

3. Mishkin v. N.Y. Holds Awareness of Content and Character of Material, Being Synonymous With Reckless, Meets Smith Requirements.

Mishkin's argument before this Court had two prongs.[10] (1) that the People's burden of proof under the New York statute was to prove beyond a reasonable doubt that the defendant knew (subjectively) that the subject matter was obscene, and 2) that the people's evidence had not met this burden. In his brief, he argued at pages 14 and 15:

> "There is not a scintilla of proof that the appellant knew the books to be obscene or sadistic or masochistic. He might have known they were erotic, but that knowledge is not sufficient."
>
> "It is not a satisfactory answer to this problem that if proof of knowledge of the obscene character is to be required, then it would not be possible to prosecute for this crime . . ."
>
> ". . . nor is it necessary for the appellant to offer suggestions as to how such proof is to be presented. The burden is on the prosecutor to justify the suppression of publications, and it is for it to discover the method for sustaining the burden. . . ."

This was also the same argument that had been made and rejected in another retailer case *New York v. Finkelstein*, 11 N.Y. 2d 300, 229 N.Y.S. 2d 367, 183 N.E. 2d 661, cert. den. 371 U.S. 863, 83 S. Ct. 116, 9 L.

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[10]The only legitimate issue open to petitioner herein, is that which Mishkin urged in his second contention, *i.e.*, that the People's evidence had not met the burden of proof under the statute. The first issue was resolved otherwise in the *Mishkin* case. Petitioner however has not seen fit to so limit himself, and has included in the one argument his contentions that the People's burden is subjective knowledge.

Ed. 2d 100 (Oct. 15, 1962), which had twice been before the New York Court of Appeals. In those decisions the New York Court of Appeals had "authoritatively interpreted"[11] the scienter requirement of the state obscenity statute, in a manner which was contrary to Mishkin's urging.

In replying to Mishkin's contention regarding the construction to be given to the New York Court of Appeals' language in the two *Finkelstein* cases this Court was required to construe the manner in which the different language in both cases was employed: one spoke of "aware of the character of the material",[12] the other of "knowledge of the contents."[13]

Pointing to the New York court's remarks in the second *Finkelstein* case which equated "scienter" with "knowledge of the contents" Justice Brennan indicated that the High Court interpreted that language as consistent with, rather than a modification of the New York court's previous scienter interpretation that "only those who are in some manner *aware of the character of the material* they attempt to distribute should be punished" and that "calculated purveyance of filth is exorcised." voiced in the first *Finkelstein* case. The New York Statute required less than actual subjective knowledge, but more than "innocent" purveyance.

In this regard, Justice Brennan cited the scienter requirement of Model Penal Code Section 251.4 (2), 1962

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[11] *Mishkin v. N.Y.*, 16 L. Ed. 2d 56, 62.

[12] *People v. Finkelstein*, 9 N.Y. 2d 342, 344, 345, 174 N.E. 2d 470, 472 (1961).

[13] *People v. Finkelstein*, 11 N.Y. 2d 300, 304, 183 N.E. 2d 661, 663 (1962), cert. den. 371 U.S. 863, 83 S. Ct. 116, 9 L. Ed. 2d 100 (Oct. 15, 1962).

and the Commentary, Model Penal Code (Tentative Draft No. 6 1957) 14 at pages 49 to 51, both of which were described as expressing a "similar" requirement. Section 215.4(2) of the Model Penal Code (1962) cited by Justice Brennan provides that: ". . . a defendant commits a misdemeanor if he knowingly or recklessly . . . sells, etc. . . . obscene matter," Section 2.02 (2)(c) of the Model Penal Code (1962) defines "recklessly" as:

> (c) Recklessly. A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and decree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation. . . ."

A person would be guilty under the "recklessly" standard of the Model Penal Code not only where he purposely avoided making a judgment on the material (class 3, *supra*), which Professor Perkins indicates is customarily regarded as "knowledge", but also where he personally was of the belief that the material was not obscene, but had no reasonable grounds for the belief—"objective" knowledge (class 4, *supra*). It therefore clearly is the law that there is no constitutional requirement which establishes "subjective" knowledge as the people's burden of proof, nor is it required by New York Penal Law 1141 under which Petitioner stands convicted.

B. There Is Ample Evidence to Support the Trial Court's Findings That Petitioner Had Knowledge (Objective) of the Contents and Character of the Materials.

The front and rear covers of Exhibits 1 and 2 are "conclusive autoptical proof of obscenity and filth." See Appendix A containing reproductions thereof. As noted by Judge Prettyman in *Womack v. U. S.*, 294 F. 2d 204, 205, cert. den. 365 U.S. 859.

> "Mr. Wigmore says: 'All evidential sources . . . are divided into three classes, namely, testimonial, circumstantial, and autoptical.' Concerning the latter he says: 'A fact is said to be evidence autoptically when it is offered for direct perception by the senses of the tribunal without depending on any conscious inference from some other testimonial or circumstantial fact."
>
> "The photographs which are exhibits in this case are conclusive autoptical proof of obscenity and filth . . ."

Petitioner was well aware of the character of the publication he was selling and should have known there was a high probability that they were hard core pornography, as their contents proved them to be. See Appendix B.

Petitioner himself admitted that he had objective knowledge of the character of the books, when he stated on cross-examination [R. 20] "I knew those books were sold there; I could see them." His statement at the time of the arrest, as related by Patrolman Greifenstein that "I think these books here are worse", referring to the girlie magazines on the counter, con-

firms what should have been obvious to any seller viewing the covers of the paperbacks at the time of the sale.

Petitioner knew that the books were being sold at a premium price, a trademark characteristic of this type of publication. *Amicus* can think of no other publication which can boast of a mark up of 20% from the regular retail price.

Petitioner was not a beginner in this trade. By his own testimony he had worked for Mr. Block for two years as a clerk in the retail book store business on 42nd Street in the midst of the "dirty book" trade. The reputation of Nightstand Books, Ember Books, Leisure Books, Pillar Books, Sundown Readers, Midnight Readers, Evening Readers are well known — notoriously known, to the book sellers on 42nd Street. Contrary to the petitioner's assertion in his Jurisdictional Statement [R. 30], books of a similar character (produced by the same publisher using the same format) have unanimously been held *not* to be constitutionally protected by the New York Court of Appeal and the highest courts of those state and federal courts which have considered the matter.

Similar books from the same publishing firm have been held: (1) to be hard-core pornography by the New York Court of Appeal under the New York obscenity statute. *Keney v. N.Y.*, In the Supreme Court of the United States, October Term 1966, No. 2 (Lust School, Lust Web, Sin Servant); *N.Y. v. Matherson,* 16 N.Y. 2d 509 (Lust Team); *Fried v. N.Y.*, 238 N.Y.S. 2d 742, cert. den. 378 U.S. 578 (College for Sinners); (2) to be hard-core pornography by the Supreme Court of Kansas under the Kansas obscenity statute. *A Quantity*

of Books v. Kansas, 19 Kans. 13, 379 P. 2d 254, reversed on procedural grounds 378 U.S. 205 (Born for Sin, No Longer A Virgin, Sin Girls, Sin Hotel, Miami Call Girl, Lesbian Love, Sex Jungle, The Lustful Ones, The Wife Swappers, Sex Model, The Lecher, Lust Goddess, Sin Camp, $20.00 Lust, Convention Girl, The Isle of Sin, Orgy Town, Sex Spy, Trailer Trollop, Flesh Is My Undoing, Sex Circus, Malay Mistress, The Sinning Season, Sin Song, Passion Slaves, The Sinful Ones, Lover, Passion Trap, Sin Cruise, Seeds of Sin); *Kansas v. A Quantity of Books,* 197 Kans. 306 (July 14, 1966) (Sin Hooked, Bayou Sinners, Lust Hungry, Shame Shop, Fleshpot, Sinner's Seance, Passion Priestess, Penthouse Pagans, Shame Market, Sin Warden, Flesh Avenger); (3) to be obscene by the Circuit Court of Appeal for the Second Circuit under the federal obscenity statute, *Books Inc. v. U. S.* .... F. 2d .... (April 12, 1966), (Lust Job); (4) to be obscene by the Illinois Supreme Court under the Illinois obscenity statute. *Illinois v. June Sikora,* 204 N.E. 2d 768 (Jan. 21, 1965), (Crossroads of Lust, Passion Bride, Lust Campus). See also *Illinois v. Pascarello,* unreported X64-2122, 2123, a jury verdict holding "Sin Bin" and "Shame Hunger" obscene; (5) to be obscene by the Georgia Supreme Court under the Georgia obscenity statute. *Corinth Pubs. Inc. v. Wesberry,* 146 S.E. 2d 764 (Dec. 18, 1965), (Sin Whisper); (6) to be obscene by the Appellate Division of the Circuit Court of Connecticut under the Connecticut obscenity statute. *Conn v. Onorato,* 2 Conn. Cir. 428, 199 A. 2d 715, 716 (Wild Flesh, The Orgy Boys). The similarity in the trademark of such books and their patent offensiveness can be recognized at a glance. See Appendix C, containing reproductions of the front and rear covers of the subject matter referred to above.

Anyone who deals in such materials is "reckless" in the extreme (class 4, *supra*), and also meets the requirements of class 3, *supra.*

In the 7 years since the *Smith* case, appellate courts have found no difficulty in affirming convictions based on objective knowledge and substantially similar circumstantial evidence. *United States v. Samuel R. Hochman,* 277 F. 2d 631, 633 (June 7, 1960, *certiorari* denied, 364 U.S. 837, 81 S. Ct. 70, 5 L. Ed. 2d 61 (October 10, 1960), rehearing denied, 364 U.S. 906, 81 S. Ct. 231, 5 L. Ed. 2d 199 (November 21, 1960); *California v. Harris,* 190 Cal. App. 2d 887, 893, 13 Cal. Rptr. 642, 646 (May 5, 1961) reversed on other grounds, *In re Harris,* 366 P. 2d 305; *United States v. Roy A. Oakley,* 290 F. 2d 517 (May 24, 1961), *certiorari* denied, 368 U.S. 888, 82 S. Ct. 139, 7 L. Ed. 2d 87 (October 23, 1961), rehearing denied, 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (December 4, 1961); *Harold S. Kahm v. United States,* 300 F. 2d 78 (February 9, 1962) *certiorari* denied, 369 U.S. 859, 82 S. Ct. 949, 8 L. Ed. 2d 18 (April 23, 1962); *California v. Williamson,* 207 Cal. App. 2d 839, 845, 24 Cal. Rptr. 734, 738 (Sept. 26, 1962) cert. denied 377 U.S. 994; *New York v. Finkelstein,* 11 N.Y. 2d 300 (1962), *certiorari* denied, 371 U.S. 863 (1962); *Wisconsin v. Chobot,* 12 Wisc. 2d 110, 106 N.W. 2d 286 (November 29, 1960), appeal dismissed for want of a federal question, 368 U.S. 15, 82 S. Ct. 136, 7 L. Ed. 2d 85 (October 23, 1961), rehearing denied, 368 U.S. 936, 82 S. Ct. 358, 7 L. Ed. 2d 198 (December 4, 1961). See also *Connecticut v. Andrews,* 150 Conn. 103, 186 A. 2d 546, 552 (November 6, 1962); *New Jersey v. Hudson County News Co.,* 41 N.J. 247, 196 A. 2d 225, 231 (December 16, 1963), (reversed on other grounds); *Nebraska v. Jungclaus,*

176 Neb. 641, 126 N.W. 2d 858, 862 (March 13, 1964); *Chicago v. Doe,* 47 App. 2d 460, 197 N.E. 2d 711, 715 (April 2, 1964); *Illinois v. Sikora,* 204 N.E. 2d 768 (January 21, 1965); *Missouri v. Vollmar,* 389 S.W. 2d 20 (March 8, 1965); *Ohio v. Mazes,* .... Ohio St. .... (July 13, 1966); *California v. Campise,* 51 Cal. Rptr. 815 (May 25, 1966); *California v. Culbertson,* 51 Cal. Rptr. 827 (May 25, 1966).

II.

STANDARDS AND CRITERIA FOR REVIEWING THE STATE COURT JUDGMENT.

A. "Obscenity" Is Primarily a Question of Fact.

1. The Terms Used by the Roth Court to Define the Area in Which Police Action Is Authorized Coincidentally Describe What Is Typically a Jury Question.

The obscenity controversy places in the balance two opposing forces which are set into motion by our constitutional form of government. On the one hand, there is a claim of the individual's right of free speech and press, as guaranteed by the First and Fourteenth Amendments of the Federal Constitution. On the other hand, there is the claim to supremacy of the right of government to regulate matters relating to public morals, by proscribing obscenity, as reserved to state governments by the Ninth and Tenth Amendments to the Federal Constitution.

When in 1957, the United States Supreme Court addressed itself to this controversy, it drew the balance between the two conflicting powers which it expressed in terms of the *Roth-Alberts* test, namely "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as

a whole appeals to prurient interest." *When such a state of facts exists,* the police power, reserved to state governments by the Ninth and Tenth Amendments, is operable and can act to proscribe such material.

When the *Roth* court excluded an area of activity from constitutional protection, it did so by defining the area of exclusion in terms which are recognizable in Anglo-Saxon jurisprudence as typical of an inquiry which poses a jury question. See Justice Brennan dissenting in *Kingsley Books, Inc. v. Brown,* 354 U.S. 436, 448 (June 24, 1957). The determination of the "average person" in the "community" is regarded as synonymous with a verdict under our jury system. XL Notre Dame Lawyer 1, 9.

2. Roth-Alberts Confirmed the Rules Established in Prior Case Law.

In our view, the Roth Court intended just this result—They did nothing more than record and update the prior rules on obscenity which had been developed in the federal system under the guidance of Federal Judge Learned Hand. Those rules established the determination of the fact of obscenity as being primarily a jury question, with concurrent areas of responsibility for the court. The reporter's notes to the 1957 draft of the American Law Institute Model Penal Code record at page 16 the results reached in prior case law:

> "13. Obscenity as Fact or Law; Role of Court. Whether material is 'obscene' is plainly one of those issues of mixed law and fact, usually submitted to the jury with instructions from the court as to applicable law, unless the judge withholds the case from the jury on the ground that the evidence could not support a conclusion of guilty."

See also *United States v. Kennerley,* 209 Fed. 119, 120, 121 (S.D. N.Y. 1913); *United States v. Levine,* 83 F. 2d 156, 157 (1936).

B. Both the Court and the Jury Have a Proper Function.

To say that obscenity is primarily a question of fact for the jury, is not to suggest, however, that in every instance such is the case. On the contrary, the court has its proper role, as does the fact finder. As the jury may sometimes overstep its bounds, *United States v. Dennett,* 39 F. 2d 564, so also may a lower court, *People v. Birch et al.,* 269 N.Y.S. 2d 752, 754 (May 2, 1966) reversing Special Term Judge Shapiro's judgment, which dismissed obscenity indictments in 40 Misc. 2d 626, 243 N.Y.S. 2d 525 (September 6, 1963) without trial. In other words, there is a line of demarcation between material and conduct which, because of its redeeming social importance, may be protected as a matter of law, and other material and conduct which has no redeeming social importance and which is either a question of fact for the jury as the finder of fact, or may be obscene as a matter of law (policy). See the reporter's comments to the 1957 draft of the American Law Institute, Model Penal Code, Section 207.10 at page 16, set out above.

This Court expressed its function, in such cases, as follows in *New York Times Co. v. Sullivan,* 376 U.S. 254, 285, 11 L. Ed. 2, 686, 84 S. Ct. 710:

> ". . . In cases where that line must be drawn, the rule is that we examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they

> are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect . . . We must 'make an independent examination of the whole record,' . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression. . . ."

The division of responsibility and the role which this Court plays, in practice, may in some cases appear difficult of statement. Perhaps the best statement is that of Justice Brennan at the end of the arguments in the *Fanny Hill* case on December 8, 1965: "In other words, we are not making a judgment as experts of literature or prurient interest or anything else, but experts in the application of the constitutional test."

Because the determination involves fundamentally a balancing of two powers, amicus wishes to stress the relative importance of the interest which supports the right of government in this area.

1. The Paramount Right of Government to Regulate Matters Relating to Sexual Morality.

In 1874 Justice Swayne, speaking for an unanimous United States Supreme Court in *Trist v. Child*, 21 Wall. 441, 450 (1874), said:

> "The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of history. . . ."

Concerning the power of government to regulate matters relating to *public morals* and power to say what

is offensive to *public morality*, the United States Supreme Court said, in *Mugler v. Kansas*, 123 U.S. 623 (1887):

> "The power to determine such questions (what is offensive to public morality) so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of many, provided only they are permitted to do as they please. Under our system, *that power is lodged in the legislative branch of the government*. It belongs to that department to exert what are known as police powers of the state, *and to determine what measures are appropriate or needful for the protection of the public morals*, the public health, or the public safety. . . ." (Our emphasis.)

The public morality that we are concerned with here are standards which relate to the sex function. Such standards encompass not only the sexual parts as they are exhibited in public displays, but also as they may be permitted by the community to become proper subjects for public discussion.

That such standards do, in fact, exist and are enforced, can be seen from the fact that government uniformly and without serious opposition enforces laws which require persons to conceal the sex organ and private parts of the body while in public. It can hardly be argued that a person might appear naked in the court room under the guise that he or she were "speaking out" on behalf of nudism, nor could that person parade naked elsewhere in the community. His or her subjective intent may be wholesome, but the community can

properly equate such conduct with lewdness, because of the prevailing sentiment in the community concerning standards of decent exposure of the person. Even Justice Douglas, was willing to concede in *Roth (supra)* at page 512, that:

> "No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct."

Similarly, representations and discussions of sex and its function may be regulated insofar as they do offend public policy as expressed through the obscenity laws.

It is to maintain the sexual standards, which are acknowledged by the great majority of people in our society, that government has, under the police power, enacted laws on indecent exposure and obscenity. Such right is an inherent part of our self-government, having been passed down to us, in our Constitution, from the Common Law Courts of England, which recorded their existence over three centuries ago.

LeRoy v. Sedley, 1 Sid. 168, 82 Eng. Reprint 1036 (1663);

4 Bl. Comm. 64;

Rex v. Curl (1727) 2 Strange 788;

Commonwealth v. Sharpless, 2 S and R. 91, 7 Am. Dec. 632 (1815);

Roth-Alberts, supra.

Louis B. Schwartz, co-reporter of the Model Penal Code, explains the governmental function of the obscenity crime in society as follows in "Morals Offenses and the Model Penal Code" appearing in 63 Columbia Law Review 669, 671 (cited by this Court with approval in *Ginsburg v. U.S.,* 16 L. Ed. 2d 31, at page

38, fn 12 page 39, fn 14; page 41, fn 19; and *Mishkin v. N.Y.*, 16 L. Ed. 2d 56 at page 63, fn 9) at page 671:

> ". . . the great majority of people believe that the morals of 'bad' people do, at least in the long run, threaten the security of the 'good' people. . . . It is hard to deny people the right to legislate on the basis of their beliefs not demonstratably erroneous, especially if these beliefs are strongly held by a very large majority. The majority cannot be expected to abandon a credo, and its associated sensitivities, however irrational, in deference to a minority's skepticism.",

and at page 672:

> "If unanimity of strongly held moral views is approached in a community, the rebel puts himself, as it were, outside the society when he arranges himself against those views . . . the community cannot be expected to make (his) first protests respectable or even tolerated by the law. . . ."

Mr. Schwartz continues at page 681:

> "But equally, it is not merely sin-control of the sort that evoked Professor Henkin's constitutional doubts. Instead, the community is merely saying: 'Sin, if you must, in private. Do not flaunt your immoralities where they will grieve and shock others. If we do not impose our morals upon you, neither must you impose yours upon us, undermining the restrains we seek to cultivate through family, church, and school.' *The interest being protected is* not, directly or indirectly, the souls of those who might be depraved or corrupted by the

obscenity, but *the right of parents to shape the moral notions of their children, and the right of the general public not to be subjected to violent psychological affront.*" (Our emphasis.)

In sum, the case for the governmental action taken by the state was stated by Justice Harlan in his concurring opinion in *Roth-Alberts* (*supra*), at page 502:

"The State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards. . . ."

Amicus believes that the history of our government refutes petitioner's claim to a supremacy of the personal right of an individual to have a "subjective" standard as a measuring guage for the "mens rea" in the obscenity crime.

We believe the function of the court in this event to be similar to that stated by Justice Brennan in his dissent in *Kingsley Books Inc. v. Brown,* 354 U.S. 436, 448, 1 L. Ed. 2d 1469, 77 S. Ct. 1325 (June 24, 1957).

"Of course, as with jury questions generally, the trial judge must initially determine that there is a jury question, i.e., that reasonable men may differ whether the material is obscene."

See A.L.I. Model Penal Code 207.10 (1957 draft) Reporter's Comments, page 16; *United States v. Kennerley,* 209 Fed. 119, 120 (S.D. N.Y. 1913)

"The same question arises as would arise upon motion to direct a verdict at the close of the case."

The test might simply be phrased, Is the petitioner "pandering" or is he "speaking". We think there is little doubt from the exhibits in this case that "hard core pornography" is involved, which we would define as material which a state court might hold obscene, as a matter of law. See Appendix B. Having satisfied itself that "free speech" is not involved, it would appear that a "sufficient evidence" standard should suffice in determining whether the *mens rea* requirement had been met under the circumstances *Jacobellis v. Ohio,* 378 U.S. 184, 12 L. Ed. 2d 793, 84 S. Ct. 1676 (June 22, 1964) Justice Warren dissenting.

Under our analysis, the burden of proof presented by the New York statute is an awareness of the character of the materials from an "objective" viewpoint. As pointed out above, there is more than "sufficient evidence" to support the trial court's findings in this regard.

Conclusion.

The judgment below should be affirmed.

Respectfully submitted,

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APPENDIX "B."

SHAME AGENT, By Don Bellmore (15 chapters, 190 pages). EMBER BOOKS c1964.

CHARACTERS:

Oscar Clement .....owner of public relations firm
Millie Clement .....Oscar's wife
Paul Clarke .....employee in Oscar's firm
Kathy .....Oscar's secretary
Norman Hollister .....TV producer
Martha Hollister .....Norman's wife
Ernie Banks .....Newspaper columnist
Rosalind Hayes .....prostitute, model

CHAPTER 1.(pp. 5 to 18)

Pages 5 to 18 describe a sex orgy betwen Paul Clarke, agent in Oscar Clement's public relations firm, and Kathy, Clement's secretary. Paul makes love to Kathy who is lying beside him in a pair of sheer blue panties while he talks on the telephone to Oscar calling him from Hollywood. Paul manages to remove Kathy's panties as he talks on the phone to Oscar, then Kathy removes Paul's shorts. She teases him, caressing and kissing all parts of his body. (p. 13) Paul does his best to handle the phone and Kathy at the same time. Oscar tells Paul he will arrive in New York the next day and ends the conversation. Paul has intercourse with Kathy, and after climax they fall off to sleep.

CHAPTER 2. (pp. 19 to 33)

The next morning Paul and Kathy have intercourse again. (pp. 30 to 32) Kathy tells Paul that Oscar went to Hollywood to try to get Norman Hollister for a client. He is an important TV producer and married to Martha, a former "bed partner" of Paul. (p. 29) Paul is surprised at this news as Oscar has not talked it over with him. He decides not to worry about it as he had the whole weekend ahead of him, and being alone with Kathy—, it promised to be quite a weekend.

CHAPTER 3. (pp. 35 to 53)

Oscar Clement arrives the following Monday. He introduces Paul to Norman and Martha Hollister, and after business negotiations, Norman leaves for an appointment and Paul takes Martha to lunch.

CHAPTER 4. (pp. 55 to 65)

Paul and Martha order drinks, and recall old times together. Martha excuses herself from the table a moment, and Paul is approached by Ernie Banks, a columnist, whom Paul dislikes. He asks Paul to arrange a date with Rosalind Hayes, a friend of Paul, who is sitting alone at another table. Rosie was one of the highest-priced call girls in New York. Paul had shared a bed with Rosie himself, and knew that she disliked Ernie intensely, so he refuses Ernie's request. After lunch Paul takes Martha to her hotel. She sees Norman leaving with a blonde, so she asks Paul up to her room.

CHAPTER 5. (pp. 67 to 80)

Martha and Paul have a heavy drinking session. Pages 74 to 80 describe a sex orgy between them. "Let me make you naked first" Martha whispers (p. 74).

They undress each other slowly, kissing and caressing all parts of the body. They have intercourse, "a wild, abandoned time" (p. 79)

CHAPTER 6. (pp. 81 to 97)

Three days later, Oscar takes ill with the flu, leaving Kathy and Paul alone to run the office. Pages 88 to 96 describe a sex orgy between them. As the couch in Paul's office is much too small, they have intercourse standing up. (p. 95) "That had been fun—real fun." p. 97

CHAPTER 7. (pp. 99 to 106)

The next week, Paul arranges an audition for Norman Hollister. He invites the press, various models, and Rosie Hayes. Norman likes Rosie so Paul arranges a dinner date, knowing Norman wanted to get Rosie in bed with him. It sort of eased Paul's conscience about his affair with Martha, Norman's wife.

CHAPTER 8. (pp. 107 to 121)

Paul calls Rosie on the phone, and she invites him over for a drink, and to talk about the dinner date with Norman. They proceed to get drunk. Pages 114 to 121 describe a sex orgy between them. They undress each other. Paul turns her over his knees and spanks her, "Her buttocks reddened and quivered from the blows of my hand, and Rosie whimpered with ecstasy." (p. 120) They have intercourse (p. 120) and after climax fall asleep in each others' arms.

CHAPTER 9. (pp. 123 to 130)

Paul sets up the date between Norman and Rosie. Rosie auditions for Norman at her apartment, and they go to bed together. Kathy tells Paul that Oscar is try-

ing to sell their agency to the Benson Agency. This is a blow to Paul, as he had hoped to become a partner in the business with Oscar. He decides to try and get Norman as his client and go out on his own, but he needs Martha's help.

CHAPTER 10. (pp. 131 to 145)

Paul has Martha come to his apartment the next evening. Paul talks Martha into helping him in trying to get Norman for a client. Pages 139 to 145 describe a sex orgy between them, They take a shower together, soaping and caressing each others' bodies. They have intercourse in the tub, (p. 144) and after climax wash the soap from their bodies, dry each other with towels, spinkle each other with talcum powder, and go to bed.

CHAPTER 11. (pp. 147 to 155)

Three days later Martha tells Paul her husband doesn't feel he is as well known as Oscar, so Paul decides to ask Ernie Banks to write him up in his column. Ernie says he will do it, if Paul will fix up a date for him with Rosie. Paul agrees, but he knows it won't be an easy job.

CHAPTER 12. (pp. 157 to 165)

Paul talks Rosie into having the date with Ernie. She agrees to go to Ernie's apartment, as she doesn't want "the likes of Ernie" in her bed. (p. 162) Paul calls Ernie about the arrangement, and Ernie promises to write them both up in his column.

CHAPTER 13. (pp. 167 to 178)

Paul goes home that evening and starts drinking. Martha surprises him with a visit. Pages 174 to 178 describe a sex orgy between them. They undress each

other, and dance to music from the record player. "That was a sensational feeling, dancing naked like that. . . ." (p. 175) They have intercourse on the floor and reach climax just as the music comes to a "crashing finish." (p. 178) They go to bed, and as Martha sleeps, Paul lies awake wondering what Rosie was doing with Ernie Banks at that very moment.

CHAPTER 14. (pp. 179 to 186)

The next day, Paul tries to call Rosie on the phone, but she doesn't answer. He calls Ernie, and senses things had gone wrong when Ernie tells him coldly to ask Rosie, and read his column. The column carried the whole story of how Paul tried to get Hollister for a client. Paul knew his career was as good as finished. He goes to see Rosie. She tells him she walked out on Ernie after scratching his face, because he wanted her to do things she could never do and to pose for pictures. She took off her robe, and showed the "ugly blue marks on her breasts and legs" that Ernie had given her. (p. 185) Paul took a cab to Ernie's apartment, and hit him in the face with all his strength, hitting him again and again.

CHAPTER 15. (pp. 187 to 190)

The next afternoon, Paul visits Oscar. Kathy is there. Oscar tells Paul he thought he was dying because he had had a heart attack, but now had decided not to sell the agency, and wanted Paul to go on working for him. He said he would discuss the partnership when he was able to return to the office. Kathy tells Paul she will go back with him, and they leave hand in hand.

LUST POOL. By J. X. Williams (14 chapters, 190 pages). PILLAR BOOK c1964.

CHARACTERS:

Marshall Jones . . . virile, ex-college football player, swimming pool cleaner.

Lolita Mazureck . . . prostitute

Pam Folsom . . . aspiring young actress

Margie . . . mulatto prostitute

Carla Holtzer . . . narcotic addict, Big Tom's wife

Sugar . . . negro prostitute

Big Tom Holtzer . . . vice lord

Lita Morris . . . Lesbian manager of the Hot Spot, strip joint.

Ronnie . . . waitress at the Hot Spot, narcotic addict and lesbian.

Louie . . . bar tender at the Hot Spot.

CHAPTER 1. (p,. 5 to 22)

This is the story of Marshall Jones, swimming pool cleaner, and his sex adventures with various "broads" as he calls them. Pages 17 to 22 describe a sex orgy with Lolita Mazureck a prostitute. Page 19 describes Marsh performing an act of cunnilingus, page 20 describes intercourse. Marsh gets Lolita to break a date with one of her steady customers, a married man, and they go out on the town.

CHAPTER 2. (pp. 23 to 43)

In one night club, Lolita points out three of her customers sitting "with their frumpy wives." (p. 23) "As

long as women like that exist, Lolita and her kind will never be out of a job." (p. 24) Marsh meets Pam Folsom while cleaning the pool at the apartment house where she lives. She is obviously a virgin, too nice a girl to get mixed up in the movie business she aspires to. Marsh feels a "brotherly love" towards her. He meets Carla Holtzer on his next job. Big Tom Holtzer, millionaire vice lord hires him to clean the pool. He never gets around to cleaning the pool as Carla, Big Tom's wife, invites him to the bath house, where they smoke opium from a pipe and engage in a sex orgy. Pages 39 to 43 describe Marshall lying helpless on a couch under the effect of the opium as Carla caresses every part of his body. He wakes up the next morning outside the gates of the Holtzer mansion, in his pick-up truck.

CHAPTER 3. (pp. 44 to 56)

Marsh goes to see Lolita, and meets her friend Margie, a mulatto, who lives across the hall from Lolita. Pages 51 to 53 describe their sex orgy. "I grabbed and played with her in a quickening rhythm. We danced and bounced like a couple of animals." (p. 52). The next day, Marsh sees Pam. He tells her to go back home before she becomes a tramp. "The word 'virgin' was written all over her." (p. 54)

CHAPTER 4. (pp. 57 to 69)

Marsh goes to the Holtzer estate again to clean the pool. As he is about to enter the gate, Carla drives out and runs over the japanese gardner. She made no effort to avoid hitting him. Marsh is so in love with Carla that he agrees to tell the police that the gardener

jumped in front of Carla's car. Big Tom Holtzer gives Marsh a job as bouncer on the weekends at his strip club, the Hot Spot if he will keep quite about the accident.

CHAPTER 5. (pp. 70 to 80)

At the Hot Spot, Marsh meets Ronnie, a waitress, Louie the bar-tender, and Lita Morris the manager. Louis tells Marsh that Lita is Big Tom's mistress. Pages 77 to 79 describe obscene gyrations of a stripper on the stage, and a man jumping up from the audience, with his belt undone as he tries to pounce on her as she lies naked. Marsh throws him out of the club, and feels its not a "bad way to earn fifty clams a night."

CHAPTER 6. (pp. 81 to 94)

The next day Marsh sees Pam again while he cleans the pool. Pam asks him to her apartment for coffee. Marsh accepts, but doesn't want to get involved with her. She says, "Marsh, what in hell does a girl have to do to get you interested in her?" (p. 93) He tells her a girl has to be a woman, and he leaves her sobbing.

CHAPTER 7. (pp. 95 to 107)

As Marsh is cleaning the Holtzer pool, Carla dives in naked and has a swim. After the swim she runs to the bath house with Marsh close behind. Sitting together naked on a couch they smoke "hashish" (p. 101). Pages 104 to 107 describe a wild sex orgy in the pool and intercourse, and perversions between Carla and Marsh as they lay on the pool steps. "I loved her will all my strength, ravishing her body . . ." (p. 106) Marsh carries Carla to the pool house, dries her off and they start their orgy all over again on the couch.

CHAPTER 8. (pp. 108 to 117)

At the Hot Spot, Marsh spies on Christine and Mandy, two strippers, nude and performing fellatio on two men customers in one of the back rooms. (p. 112) Out front on the stage he is shocked to see Pam Folsom putting on a very professional strip act as the crowd goes wild. (p. 114) Marsh, furious at Pam, tells her he will take her home after the club closes that night.

CHAPTER 9. (pp. 118 to 130)

Pages 120 and 121 describe the obscene strip put on by Pam as she did her last show of the evening. Pam asks Marsh to her apartment, and promises she will leave the show if he will make love to her. He agrees but warns her he is in love with someone else. She tells him she is not a virgin, that there was one other, a boy she knew in high school. Pages 127 to 130 describe their orgy, as he performs an act of cunnilingus on her, ending in intercourse and wild climax. (p. 125)

CHAPTER 10. (pp. 131 to 141)

The next morning, Pam and Marsh have another orgy in bed, "Not as long this time, but just as good." (p. 133) They spend the weekend together, and Pam says she is going to keep on working at the club. On this pool cleaning job, Marsh runs into the two prostitutes again, Lolita and Margie. Pages 136 to 141 describe a wild sex orgy with both girls at once in Lolita's bed, "we were all involved in an inextricable tangle of arms and legs, breasts, middles, buttocks—" (p. 138) "Not only did they caress me they managed to get at one another too." (p. 138) They have another round of drinks, "and then we were back in the bedroom, piled

PASSIONATE FREAKS...

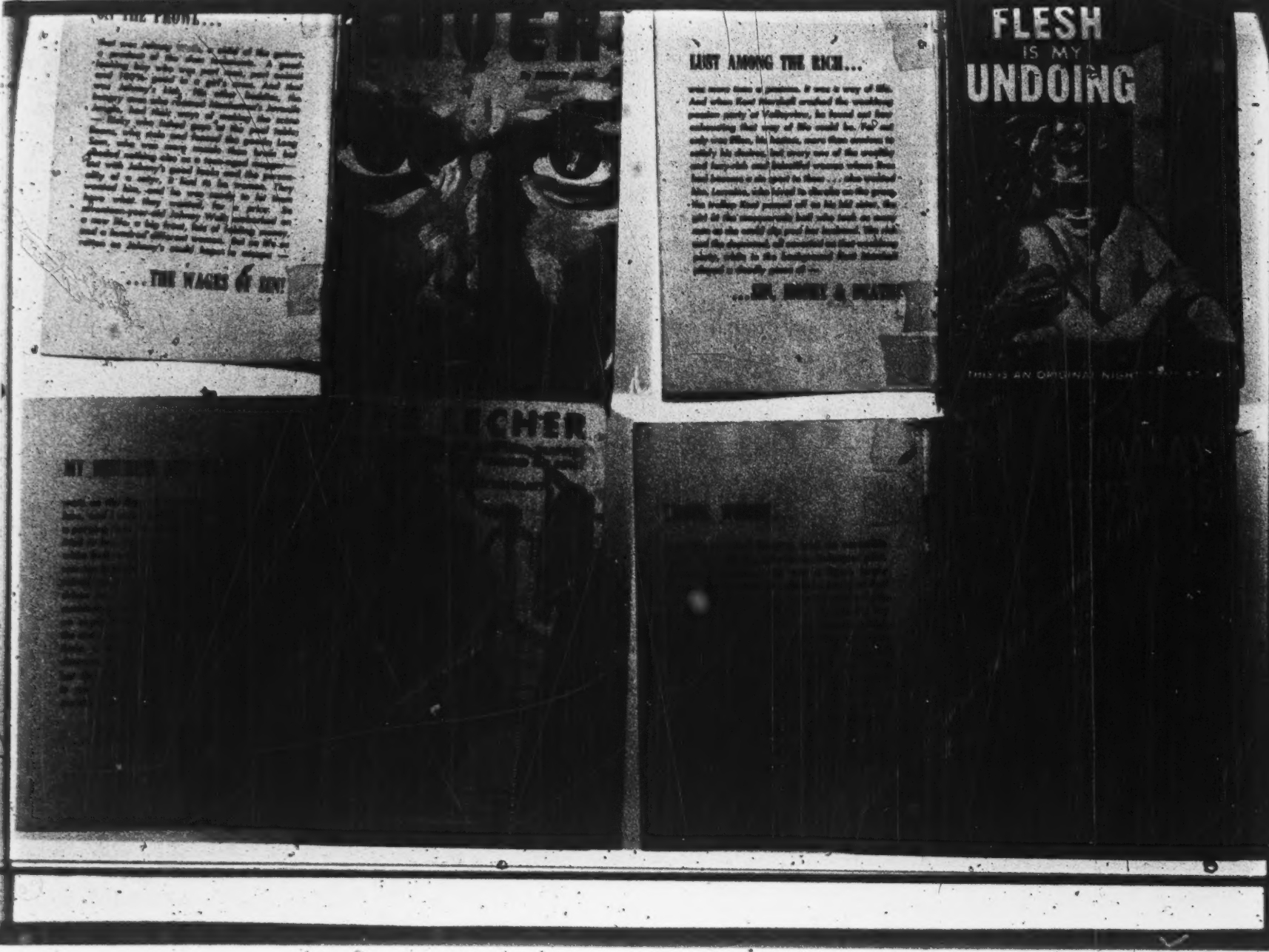
...ON A SEX HIGHWAY!

LUST SPREE...

...PASSION CARNIVAL!

SHE HAD A BIG BODY WITH A BROOM, LUST TO

PASSION TRAMP


...THE WAGES OF SIN!
LUST AMONG THE RICH...
FLESH
IS MY
UNDOING

FOUR WILD GIRLS...
in a trailer. four girls who practiced the oldest profession known to women. Four girls who were ruled by a lust-passion that demanded they ruin the town of Coldwater and its inhabitants. The first was Jan, who had lost her trailer-camp soldier-husband to a two-eyed town serpent. Joy vowed to make the town, the trailer camp and particularly her husband, regret what they had done to her. Second and third were Marie and Andrea, one a voluptuous blonde, the other a petite brunette, but both lesbians, who embraced men for the money and each other for love. Last was Essie, the Negro who was almost a zombie, who gave her body because she thought she was dirt. All four of them on personal vendettas...
...ON A PASSION RIDE!
TRAILER TROLLOP
THE PASSION BUG...
LOVE NEST
The SINFUL ONES